Tax Authority Advice and the Public

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Remedies

> But public servants are human, and it is human to err. They are not immune from the weaknesses which afflict the rest of mankind. They may, by words or conduct, arouse expectations which are later dashed*

I. Introduction

In order for the rule of law to be advanced, taxpayers to the greatest extent possible ought to be entitled to rely upon advice which affects them. Without reliability, the advice is essentially weightless and will fail to assist a taxpayer in understanding the legal consequences of her action(s). To this end, there ought to be appropriate mechanisms in place to ensure that the tax authority does not renege on its advice. Of course, formal rulings are binding on HMRC, as are instruments of general advice which have the force of law, such as some VAT notices.[1] But even outside of this context, it is the published position of HMRC that its advice can be binding, and so on paper that ought to be the end of the discussion. But HMRC qualifies this general position in several respects.[2] First, it must be demonstrated that the taxpayer's position falls within the scope of the advice. Secondly, there are particularities in respect of individual advice in that the taxpayer must have directed HMRC to all material facts and made HMRC aware of the purpose of the request for advice. Thirdly, there must not be a conflict with HMRC's duty to collect tax. This duty, as HMRC interprets it, means that HMRC must depart from its advice where there is for instance a change in the law or a change in the understanding of the law. It also means that the advice will not be binding where it is incorrect, though this is qualified to the extent that a taxpayer will be protected where she can show financial detriment would occur if the correct advice were applied.[3]

* Lord Bingham, Foreword to R Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (London, Sweet and Maxwell, 2009).

[1] See, for instance, HMRC, 'How to use the VAT retail Apportionment Scheme' (VAT Notice 727/4) (January 2013). On formal rulings, see above ch 2 in text at n 18.

[2] See together HMRC, 'When you can rely on information or advice provided by HM Revenue and Customs' (March 2009) and HMRC, 'Admin Law Manual: ADML1300' (July 2016).

[3] There is confusion on this point in the publicly available HMRC guidance cited ibid. In the 'Admin Law Manual' it is also mentioned that it must be demonstrated that HMRC's conduct amounts to an abuse of power, but then (circularly) provides that an abuse of power would arise where a taxpayer can demonstrate financial detriment.

Even before assessing how HMRC follows this position in practice, these qualifications alone suggest that taxpayers need to be aware of the potential remedies available to them where HMRC seeks to renege on its advice.[4]

Where HMRC produces advice upon which the taxpayer seeks to rely, public law provides protection in the form of the doctrine of 'legitimate expectations'. Private law may in theory be of assistance to taxpayers, though this merits only brief consideration given that legitimate expectations is a much more developed taxpayer protection. There may be a temptation of those who are legally trained to fetishise legal protection, but any study of taxpayer remedies would be incomplete without consideration of the protections afforded outside the tribunals and courts system. In particular, the Adjudicator's Office ('Adjudicator') and Parliamentary and Health Service Ombudsman ('Ombudsman') can provide relief for taxpayers, though the jurisdiction and enforcement capability of these bodies suggest that their impact is necessarily limited. The overarching thesis in this chapter is that there are serious shortcomings in relation to the remedies available in terms of providing reliability for taxpayers.

The chapter will proceed by examining first how public law can assist taxpayers, assessing principally the common law doctrine of legitimate expectations though supplementing this discussion with consideration of its interaction with the European Convention on Human Rights ('ECHR') and EU law. The chapter will then briefly consider private law remedies. Finally, the chapter will consider the protections afforded outside the tribunals and courts system.

II. Public Law

The doctrine of legitimate expectations provides relief where a public authority goes back on an earlier indication that it would follow a certain course. If successfully invoked, it can provide a substantive remedy for a taxpayer. In other words, a substantive benefit in the form of the non-payment of money to HMRC.[5] Although the doctrine is one which has been in constant flux for several decades,[6] the broad tenets of a successful claim for a substantive remedy under this doctrine in tax

[4] This book is only concerned with holding HMRC to its advice. It does not consider the consequences for taxpayers in terms of distress and worry caused by HMRC for which taxpayers may be entitled to compensation. HMRC does provide payment for such distress: HMRC, 'Complaints and Remedy Guidance: CRG3200' (November 2018).

[5] This is to be contrasted with procedural remedies, such as a right to be consulted, which can also be granted in the case of legitimate expectations: *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755, [2008] All ER (D) 127 [47]–[49].

[6] *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681695 (Simon Brown LJ); *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69] (Laws LJ). It is probably more settled now as a result of the Supreme Court decision in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2018] 2 WLR 1583. On which, see: S Daly and J Tomlinson, 'Administrative Inconsistency in the Courts' (2018) 23 *Judicial Review* 190.

cases are relatively set. The first is that there must exist a 'legitimate expectation'[7] and the second is that frustrating this expectation would be unlawful,[8] though these two limbs are not mutually exclusive.

On the first limb, the initial pronouncement of the law in this area came in the case of *R v Inland Revenue Commissioners, ex parte MFK Underwriting* ('*MFK Underwriting*').[9] Therein Bingham LJ (as he then was)[10] set out two conditions necessary for an expectation to be legitimate in tax, from which there has been little subsequent divergence.[11] The first is that the taxpayer placed all her cards face upwards on the table.[12] This condition is applicable only where an individual taxpayer has sought out a ruling from HMRC.[13] In such an instance, she must give full details of the specific transaction on which she seeks the ruling and she must indicate the purpose of the ruling sought, in other words, that she seeks to rely upon it.[14] The second condition is that the taxpayer received a promise, representation or assurance, or there was an established practice,[15] which was clear, unambiguous and devoid of relevant qualification.[16] Although a 'literal reading' of Bingham LJ's judgment might suggest this condition would not apply to communications directed at taxpayers generally,[17] it has later come to be accepted that it does.[18] In the case, he remarked that a statement formally published by HMRC to the world 'might safely be regarded as binding, *subject to its terms*, in any case falling clearly within them' (emphasis added).[19] Logically, however, a case would fall clearly within the scope of a publication *only* if the terms were clear and unambiguous.[20] Similarly, 'its terms' would need to be unqualified as a condition precedent to creating an expectation upon which there could be any reliance.[21]

The second limb of the doctrine is that frustrating the expectation must be unlawful and the onus shifts to the public authority to demonstrate that it

[7] See *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, [2012] 1 All ER 1048 [25]–[29] (Lord Wilson).

[8] *United Policyholders v AG of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383 [38] cited approvingly in *R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075, [2017] STC 2048 (*Hely-Hutchinson* (CA)) [36].

[9] [1990] 1 WLR 1545 (CA). This dicta was affirmed in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 [60] (Lord Hoffmann).

[10] Throughout this chapter he will be referred to as Bingham LJ given that at issue throughout is his judgment in *MFK Underwriting*.

[11] The most recent tax case on legitimate expectations to reach the Supreme Court was that of *Gaines-Cooper* (n 7) wherein the court based its analysis on Bingham LJ's formula ([28]).

[12] *MFK Underwriting* (n 9) 1569.

[13] ibid.

[14] ibid.

[15] This aspect is added here due to the later judgment of *Unilever* (n 6).

[16] *MFK Underwriting* (n 9) 1569.

[17] ibid.

[18] *Bancoult* (n 9) [60]; *Gaines-Cooper* (n 7) [29] (Lord Wilson).

[19] *MFK Underwriting* (n 9) 1569.

[20] See *R (Tunbridge Wells BC) v Sevenoaks Magistrates' Court* [2001] EWHC 897 (Admin), [41] (Sullivan J).

[21] See: *Bancoult* (n 9) [60] (Lord Hoffmann); *Gaines-Cooper* (n 7) [29] (Lord Wilson).

is acting lawfully.[22] As this limb of the doctrine developed this was sometimes understood as an action on the part of a public authority which is so unfair as to amount to an 'abuse of power',[23] or 'conspicuously unfair'.[24] But claims for legitimate expectations should no longer be couched in such language. Following the decision in *R (Gallaher Group Ltd) v Competition and Markets Authority* ('*Gallaher*'),[25] it is clear that the doctrine of legitimate expectations is not a *sui generis* ground of review, but rather that an unlawful action in respect of a legitimate expectation must be grounded in the accepted grounds for judicial review.[26] Generally, this will require HMRC to demonstrate that refusing to give effect to the legitimate expectation is not *unreasonable*.[27] In the context of legitimate expectation tax cases, this essentially invites a balancing exercise between, on the one hand, detriment to the private interest of the individual in frustrating an expectation as against the detriment to the public interest, on the other hand, in giving effect to it.[28] Mere unfairness as such, which could be characterised as 'a bit rich' but nevertheless understandable, will not suffice.[29] It is necessary that the decision by HMRC to renege on its earlier communication is so *unreasonable* that it should not be permitted to stand.[30] An example of such unreasonableness would be HMRC reneging on an earlier agreement with immediate effect.[31] Giving the taxpayer a reasonable transitional period in which to rearrange her affairs, on the other hand, would not.[32]

Interestingly it is not necessary that the commitment on which the claim for legitimate expectation is grounded is actually communicated to the affected party. The orthodox case where the doctrine will assist a taxpayer is where she has received information from HMRC on which she then acts. However, the doctrine

[22] *Paponette & Ors v Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2010] UKPC 32, [2012] 1 AC 1 [37] (Dyson SCJ). On which, see: *R (on the application of) v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801 [58] and *In the matter of an application by Geraldine Finucane for Judicial Review* (Northern Ireland) [2019] UKSC 7 [64] (Lord Kerr).

[23] *R v North and East Devon Health Authority (ex p Coughlan)* [2001] QB 213 (CA), [2000] 3 All ER 850 [57] (Lord Woolf); *In Re Preston* [1985] 1 AC 835, 864H, [1985] STC 282 (HL) (Lord Templeman).

[24] *Unilever* (n 6) 695 (Simon Brown LJ).

[25] *Gallaher* (n 6).

[26] Which has a certain circularity as there is no common consensus on the categorisation of the grounds for review; see M Elliott and R Thomas, *Public Law*, 3rd edn (Oxford, Oxford University Press, 2017) 497. See *CCSU v Minister for the Civil Service* [1985] AC 374 for the famous tripartite categorisation.

[27] See *Gallaher* (n 6), in particular [41]. In the High Court in *R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261 (Admin), [2016] STC 962 (*Hely-Hutchinson* (HC)), the taxpayer succeeded essentially on the ground that there were relevant considerations which were not taken into account. That case was overturned in the Court of Appeal (*Hely-Hutchinson* (CA) (n 8)) and in any event preceded the Supreme Court judgment in *Gallaher*.

[28] See: *Coughlan* (n 23) [57] (Lord Woolf).

[29] *Unilever* (n 6) 697 (Simon Brown LJ).

[30] ibid; *R v Inland Revenue Commissioners, ex parte Unilever plc* [1994] STC 841, 849 (Macpherson J).

[31] For instance, *Unilever* (n 6).

[32] *R (Cameron) v HMRC* [2012] EWHC 1174 (Admin), [2012] STC 1691 (Wyn Williams J) [70]–[71]. See also: *R (Bamber) v HMRC* [2005] EWHC 3221 (Admin), [2006] STC 1035 [59] (Lindsay J).

also imposes a requirement on public bodies to act consistently across persons, unless there is a good reason not to.[33] Of course, when it comes to the balancing act between private and public interests in terms of assessing the *reasonableness* of reneging on the earlier commitment, the person will have a stronger claim where she acted in reliance on the advice. The claim will be stronger again where she has relied on the advice to her detriment.[34] It is for this reason that above it was noted that HMRC's position does not properly reflect the correct legal position on when advice can be binding. To recall, HMRC's position is that it must collect tax where the advice is incorrect unless it can be demonstrated that there is financial detriment. But the correct legal position is less strict – yes, financial detriment *can* demonstrate unreasonableness on the part of HMRC and it will be in exceptional circumstances where its absence is not fatal for substantive legitimate expectations claims, but it is not the *only* way to demonstrate unlawful conduct.[35]

The two limbs to the doctrine are not mutually exclusive, but are interrelated. For instance, the clarity of a representation will have a bearing upon whether resiling from it would be unreasonable.[36] By this standard, bespoke advice to an individual taxpayer is likely to be much more targeted than general advice, thus by its nature making it more likely to be unreasonable to resile from it.[37] On the other hand, if a taxpayer were to have concealed material information in the request for a ruling, HMRC would not be acting improperly in refusing to give effect to it.[38]

A. Inaptness of the Doctrine of Legitimate Expectations

Having set out the initial framework within which legitimate expectation claims are assessed, it is now possible to move on to the overarching argument of this section, namely that the doctrine of legitimate expectations provides insufficient protection for taxpayers seeking to rely upon HMRC advice. There are five key

[33] *Gallaher* (n 6) [29] (Lord Carnwath); *Bancoult* (n 9) [182] (Lord Mance). The fact that the doctrine protects various interests is well explained in R Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 *LQR* 639.

[34] See *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237 (Schiemann LJ) [29]; *R v Department of Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100 [48] (Gibson LJ); *Bancoult* (n 9) [60] (Lord Hoffmann). For a tax case where this arises, see *R (Aozora) v HMRC* [2017] EWHC 2881 (Admin), [2018] STC 11 [98] (Sir Kenneth Parker). The courts' focus on detriment overlooks the possibility of developing the doctrine on the basis of what David Owens calls 'authority interest'. The basic idea is that once a promise has been given, the control over that promise shifts to the promisee and so the promisee should control whether the promise is not given effect. The virtue of this position is that 'human beings often want such authority for its own sake (not just to facilitate prediction or coordination)'. See: D Owens, 'A Simple Theory of Promising' (2006) 115 *Philosophical Review* 51.

[35] This was noted by Whipple J in *Hely-Hutchinson* (HC) (n 27) [64] and accepted by the Court of Appeal: *Hely-Hutchinson* (CA) (n 8) [92].

[36] See: *Tunbridge Wells BC* (n 20) [41] (Sullivan J).

[37] *Bhatt Murphy* (n 5) [46].

[38] See *R v IRC, ex p Matrix Securities Ltd* [1994] 1 WLR 334.

problems for taxpayers, which broadly map on to issues of correctness, clarity and accessibility under assessment in earlier chapters. The first two relate to satisfying the second limb, binding HMRC even in the case of incorrect advice ('Correctness') and relatedly, negating HMRC's desire to maintain control ('Control'). The second two relate to satisfying the first limb of a successful claim, namely demonstrating sufficient clarity on the part of HMRC ('Clarity') and not being caught by a qualification ('Qualifications'). Finally, there is the issue of access to justice ('Access').

i. Correctness

Though the doctrine of legitimate expectations generally performs an important function in holding public authorities to their representations or practices, a cynic might note that it is at its most useful in tax where, but for a representation of HMRC, monies would otherwise have been due.[39] But that begs a critical question concerning HMRC's duties – how can it be within HMRC's powers to uphold an expectation that it will not collect tax which it has a duty to collect? The answer is that it is within HMRC's powers to uphold an expectation even if this means collecting less tax than is due.[40] But in order to explain the answer in this particular context it is necessary to start by noting that a public authority must act lawfully, including by acting within its powers (*intra vires*).[41] HMRC would accordingly be acting ultra vires if it sought to sell financial products,[42] or to levy taxes.[43] Given that the duty is to collect tax, this requires at a minimum that HMRC not act directly contrary by explicitly agreeing not to investigate or challenge a taxpayer's future affairs in return for a fixed sum of money, as occurred in *Al-Fayed v Advocate General for Scotland (CIR)*.[44] But it has already been established that it is within HMRC's powers to provide assistance to taxpayers in the form of advice,[45] and this is so even if the advice is incorrect in the sense of misunderstanding a taxing provision (procedural or substantive)[46] or its application to the facts.

[39] *R (on the application of Lower Mill Estate Ltd and Conservation Builders) v Revenue and Customs Commissioners* [2008] EWHC 2409 (Admin), [2008] BTC 5743 [22] (Blake J). It is left open here whether there is such a thing as *the* right answer in tax as to how much tax is due by talking only of a mistake leading to *an* answer which is incorrect.

[40] See ch 3 section II B i.

[41] The doctrine of ultra vires is one of the cornerstones of the UK's constitutional framework and in broad terms forms the basis for judicial intervention. See *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 171 (Lord Steyn); *R v Hull University Visitor, ex parte Page* [1993] AC 682 (HL), 701 (Lord Browne-Wilkinson). For prerogative powers and non-statutory bodies, see for instance, *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815 (CA).

[42] See on this point, the case of *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL).

[43] *Attorney-General v Wilts United Dairies Ltd* (1921) 39 TLR 781 (CA).

[44] [2004] ScotCS 112, [2004] STC 1703 (IH).

[45] See ch 3 in text at n 74.

[46] By this I mean to include both those provisions which impose or relieve taxes, and those provisions which impose obligations on either HMRC or the taxpayer as to the procedure to be followed in order to comply with the substantive provisions.

Were it otherwise, there would be undesirable consequences that it must be assumed were not intended by Parliament.[47] For instance, it would result in injustice for taxpayers who sincerely placed reliance upon HMRC's advice.[48] It would also be impractical, for HMRC would be held to be acting beyond its powers every time it makes a mistake, which itself would produce the perverse incentive to delay or avoid decisions indefinitely for fear of making mistakes. Or indeed, conversely, the incentive might be to be cavalier, knowing that any mistakes can later be corrected.[49] To this end, Bingham LJ in *MFK Underwriting* rightly rejected as too narrow the notion that any mistake on the part of the tax authority resulting in less tax collected would be in conflict with the statutory duty.[50] Indeed, despite what counsel may have argued in the case, Leonard Beighton, the Director-General of the Inland Revenue, recognised that the Revenue could be bound by assurances 'however unsound the rulings might have been'.[51] Moreover, HMRC's practice is to let past mistakes lie, thereby accepting that mistakes are within its powers. For instance, by way of ESC A19 taxpayers can ask HMRC not to seek taxes due if it has made a mistake because it did not act on information provided.[52]

One could seek to invoke the Bill of Rights Act 1688/9, Article 1 of which provides that the suspension of laws without consent of Parliament is illegal, whilst Article 4 proscribes the levying of taxes without Parliamentary approval. Thus HMRC mistakes which either result in more or less tax than is due could be constitutionally problematic, though in response it should be countered that, for the reasons already listed, Parliament's will is not undermined as it can be taken to have intended that mistakes are within the powers it granted HMRC.

Further, it does not undermine the rule of law rationale for providing advice if the advice is itself occasionally wrong. In a parallel context, Lord Reed noted in *AXA General Insurance Ltd v Lord Advocate*[53] that 'the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority

[47] In an earlier article, I was more hesitant to suggest this – but even if this proposition is incorrect, an alternate argument on the basis of common law constitutionalism can produce the same result. See S Daly, 'Recent developments in tax: *vires* revisited' [2016] 2 *Public Law* 190. The argument would go as follows: incorrect advice may be unlawful. But it is also unlawful for HMRC to act contrary to the principle of good administration. Thus, the role of the court in such an instance would be to balance the two unlawful actions against each other. This latter argument ought to be credited to Rebecca Williams with whom the author had invaluable discussions when writing the aforementioned article. See also: P Craig, 'Representations by Public Bodies' (1977) 93 *LQR* 398, 413–17.

[48] P Craig, *Administrative Law*, 8th edn (London, Sweet and Maxwell, 2016) 700. Though Craig was speaking in the context of ultra vires expectations, the argument still applies as in the situation discussed here the issue is whether there ought to be an expanded category of actions which should count as ultra vires.

[49] See *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1 [103] (May LJ); *Stretch v West Dorset DC* (1999) 77 P & CR 342, [1998] 3 EGLR 62 (CA) 66–67 (Peter Gibson LJ).

[50] See *MFK Underwriting* (n 9) 1567C and 1568F. See also *Gaines-Cooper* (n 7) [26] (Lord Wilson).

[51] L Beighton, 'The Finance Bill process: scope for reform?' [1995] *British Tax Review* 33, 41.

[52] See in HMRC, 'Extra-Statutory Concessions: Concessions as at 6 April 2018' (April 2018). See also ESC B41 in that list and HMRC, 'What happens if we've paid you too much tax credits (COP 26)' (April 2019).

[53] [2011] UKSC 46, [2012] AC 868.

must be examined by a court'.[54] What is important, it is submitted, is that on the whole taxpayers are better advised as to the legal consequences of their actions because HMRC provides advice. Moreover, the designation of advice as incorrect in such a context is far from straightforward – does it take the Supreme Court determining it to be incorrect or would it suffice simply if there was a legal opinion to that effect? Further, whilst incorrect advice does not help individuals understand the *true* legal consequences of their actions, it does help individuals understand the de facto consequences of their actions. In terms of planning their lives then, human dignity, the value which underpins the thin account of the rule of law, is offended by removing this foreseeability about the consequences of actions. But it should go without saying that HMRC of course should still strive to ensure that the advice is correct.[55]

However, whilst the presence of a mistake does not render the advice unlawful, it will nevertheless prove problematic for taxpayers as it affords HMRC a strong argument (though not a 'trump card')[56] that it has a 'good reason' to frustrate the expectation – namely that Parliament has prescribed that more tax is due – hence shielding HMRC from an accusation of irrationality.[57] To this end, it is often remarked by the courts that a taxpayer's prima facie legitimate expectation is to be taxed in accordance with the law.[58] There is a strong public interest in the imposition of taxation in accordance with the law.[59] It is for this reason that HMRC will be held to be acting lawfully where it retrospectively changes its advice where a mistake has been made.

For instance, in the case of *Hely-Hutchinson v HMRC*[60] the Court of Appeal held that the fact that the guidance which the taxpayer sought to rely on contained an error inter alia justified HMRC's decision not to honour its previous advice. In 2003, the Inland Revenue issued guidance in respect of the calculation of capital gains tax on sales of share options.[61] In 2009, HMRC acknowledged that the guidance contained an error of law and produced revised guidance.[62] As regards closed cases where the 2003 guidance was relied upon, HMRC has applied the terms of

[54] ibid [170].

[55] See ch 4 in text at n 8.

[56] *Hely-Hutchinson* (HC) (n 27) [43] (Whipple J).

[57] On mistakes see for instance *Gallaher* (n 6) [62] (Lord Briggs); *R (O'Brien) v Independent Assessor* [2007] 2 AC 312 (HL) [30] (Lord Bingham); *Customs and Excise Comrs v National Westminster Bank plc* [2003] EWHC 1822 (Ch), [2003] STC 1072 [66] (Jacob J).

[58] *MFK Underwriting* (n 9) 1569; *R (Greenwich Property Ltd) v Commissioners of Customs and Excise* [2001] EWHC 230 (Admin); *Lower Mill Estate* (n 39) [13] (Collins J); *Gaines-Cooper* (n 7) [28] (Lord Wilson).

[59] *Samarkand Film Partnership No. 3 & Ors v Revenue And Customs* [2017] EWCA Civ 77, [2017] STC 926 (*Samarkand* (CA)) [115].

[60] *Hely-Hutchinson* (CA) (n 8). Part of this discussion is extracted from a longer case note that the author has written: S Daly, 'Legitimate expectations and HMRC advice' (2018) 77 *Cambridge Law Journal* 265. For another example where a mistake was critical, see: *R (Veolia and Viridor) v HMRC* [2016] EWHC 1880 (Admin), [2016] STI 2201.

[61] Inland Revenue, 'Technical Note' (January 2003).

[62] HMRC, 'HMRC Brief 30/09: Shares acquired before 10 April 2003 by exercising employee share options – allowable deductions' (July 2019).

the 2003 guidance. Where the case was open in 2009, as in the case of the taxpayer Ralph Hely-Hutchinson, HMRC applied the less favourable 2009 guidance. The Court of Appeal found that HMRC's decision to do so was lawful, critically noting that HMRC had 'good reason' to depart from it.[63] This was because it contained a mistake, but the Court did little to elaborate upon the circumstances in which a mistake can be said to have arisen. What about the case where it is highly unclear whether HMRC has previously made a mistake? What counts as a mistake – does internal legal advice pointing out a possible mistake suffice? What if a tribunal or other judge finds against an HMRC interpretation?[64] Perhaps the lack of reasoning is explained by the fact that HMRC's error was particularly obvious and hence it went without having to be said that in such an obvious case HMRC could reverse its position. But that explanation is difficult to square with the Court's statement earlier in the judgment that it was 'not concerned with the correctness of HMRC's view'.[65]

In any event, it is clear that in many cases HMRC will be found to have acted lawfully by frustrating a legitimate expectation if the underlying advice contained a mistake. Taxpayers can be more confident in cases where they can demonstrate detrimental reliance, as courts are generally comfortable with holding it to be unlawful in such circumstances to frustrate the expectation.[66] The taxpayer needs to be able to show something akin to positive causation[67] – for example, where a taxpayer builds student accommodation thinking it will be entitled to relief,[68] or sells a family home and moves abroad[69] or, in the case of a seafarer, sets off from anchorage before midnight.[70] The detriment of simply having to pay the tax that is due will not suffice alone – recalling that a taxpayer's prima facie expectation is to be taxed in accordance with the law[71] – nor will the detriment caused by events external to the reliance on the advice.[72]

[63] *Hely-Hutchinson* (CA) (n 8) [62]–[65].

[64] Indeed, HMRC has previously ignored First-tier Tribunal decisions which it dislikes. The *HSBC Holdings plc and The Bank of New York Mellon Corporation v HMRC* [2012] UKFTT 163 (TC) decision, which was not followed in HMRC, 'Revenue and Customs Brief 14/12' (May 2012), as noted in T Bowler, 'HMRC's Discretion: The Application of the *Ultra Vires* Rule and the Legitimate Expectation Doctrine' (Institute for Fiscal Studies, December 2014) para 3.1.

[65] *Hely-Hutchinson* (CA) (n 8) [3].

[66] *Bibi* (n 34) [29] (Schiemann LJ); *Begbie* (n 34) [48] (Peter Gibson LJ); *Bancoult* (n 9) [60] (Lord Hoffmann).

[67] In *Aozora* (n 34) [98], Sir Kenneth Parker found against the taxpayer's claim for legitimate expectation, noting that in order to demonstrate that it was unlawful for HMRC to resile on the expectation, the taxpayer would have to be able to show that 'but for the advice that unilateral tax credit was available, it would not have made the business decision that it did, but would have made a business decision that was more favourable from a tax point of view'.

[68] *Greenwich Property* (n 58).

[69] *Cameron* (n 32).

[70] Adopting the facts of *Gaines-Cooper* (n 7).

[71] See text at n 58. Though this would be different in the case where a taxpayer would account for the tax but for the legitimate expectation and pass on the cost to an end consumer as in *R (Biffa Waste Services Ltd) v Revenue and Customs* [2016] EWHC 1444 (Admin), [2017] Env LR 10.

[72] *Hely-Hutchinson* (CA) (n 8) [92].

Further, taxpayers may also succeed if they can show comparative unfairness because a similarly placed taxpayer has received different treatment, though we have yet to see a successful tax case to date where this argument by a taxpayer has succeeded.[73] The problem lies in finding a comparator in a 'materially identical'[74] position, rather than simply finding another taxpayer who has been treated differently. In *Hely-Hutchinson*, the taxpayer argued that the relevant comparator was people who submitted their tax returns in reliance on the 2003 guidance, but the Court of Appeal held that the relevant comparator group was those taxpayers whose returns were still open when the 2009 guidance was introduced.[75] And the taxpayer was treated the same as those in the latter category, though not those in the former category.

Perhaps in the future, the Court may also accept the rule of law rationale advanced in this book, or at least the human dignity aspect underpinning the principle, as an important factor in determining whether it would be unlawful to resile from incorrect advice. But as it currently stands, beyond exceptional circumstances where detrimental reliance or comparative unfairness or something akin to either can be demonstrated, the orthodox position that one cannot rely upon incorrect advice holds. The taxpayer accordingly is severely hindered by an inability to rely upon advice which contains incorrect information. The taxpayer is also hindered, at a broader level, by the uncertainty as to whether HMRC should discover a mistake at a later date and rescind the previous treatment.

ii. Control

A bolder proposition is that the doctrine of legitimate expectations is hampered by HMRC's desire to maintain control over use of its advice, so as to counteract unforeseen advantages being gained by taxpayers. The desire to maintain control most likely stems from discomfort with the idea that HMRC is to blame for reduced revenues for the exchequer. Several arguments are advanced in support of this contention, drawing upon the prevalence of 'qualifications' and HMRC's approach to changes of interpretation. In the first instance, the assertion is borne out by the very insertion of 'qualifications' such as health warnings and provisos. In *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* (*Gaines-Cooper*),[76] HMRC argued successfully that the insertion of the 'health warning' encouraging contact

[73] Whipple J upheld the taxpayer's complaint in the High Court in *Hely-Hutchinson* on the basis that HMRC should also take into account the comparative unfairness of treating taxpayers with open cases differently from persons whose cases are closed (*Hely-Hutchinson* (HC) (n 27) [71]). Although the decision was overturned by the Court of Appeal, the Court did not reject Whipple J's decision that comparative is a relevant consideration – *Hely-Hutchinson* (CA) (n 8) [52]–[65]. For another failed tax case invoking comparative unfairness, see *City Shoes v HMRC* [2018] EWCA Civ 315, [2018] STC 762.

[74] See *Hely-Hutchinson* (CA) (n 8) [53] and [62].

[75] See *Hely-Hutchinson* (CA) (n 8) [64].

[76] *Gaines-Cooper* (n 7).

with HMRC in any case of difficulty in applying the relevant guidance, prevented HMRC from being bound *ab initio*.[77] Given that this judgment was handed down in 2011, the continued use of health warnings indicates that the purpose is to reserve to HMRC control over the use of its published advice. By extension, the inclusion of provisos precluding reliance in a case of 'tax avoidance' similarly seeks to endow broad discretion upon HMRC. HMRC uses the word 'avoidance' to mean bending the rules of the tax system to gain a tax advantage that Parliament never intended,[78] but this is not a definition from the case law, and nor is it a statutory definition of tax avoidance.[79] By using its own broader definition, HMRC can take a wide approach as to what it might define as 'avoidance', giving the body the opportunity to counteract use of its advice by the taxpayer which it dislikes. The explicit insertion is crucial, as noted by Collins J in *R (Greenwich Property Ltd) v Commissioners of Customs and Excise ('Greenwich Property')*[80] as such a proviso must be expressed and cannot merely be implied into communicated material.[81]

Secondly, the approach to changes in legal advice reinforces the contention that HMRC seeks to reserve discretion to counteract benefits perceived to be undue, given that it is not forced to do so. HMRC's position in such an instance is that it is generally bound to follow the new legal interpretation.[82] Carnwath J (as he then was) in *R v Customs and Excise Commissioners, ex parte F & I Services Ltd*[83] noted that a 'bona fide change of legal opinion within the commissioners *might* be expected' (emphasis added) to preclude the previous advice from being binding prospectively.[84] But HMRC may also seek to apply the new legal interpretation retrospectively, as occurred in the case of *Hely-Hutchinson*, where the new interpretation applied to all who had previously sought to rely on the 2003 guidance and whose cases were still open in 2009. In neither case, particularly in the latter, is it an *obligation* for HMRC to do so. Of course, it is under a duty to collect taxes and there is a strong public interest in collecting taxes which are due. But a change of legal opinion does not prove that taxes are due, no more than an unfavourable

[77] ibid [32] (Lord Wilson); [64] (Lord Hope); [66] (Lord Walker).

[78] HMRC, 'Tax avoidance: an introduction' (September 2016).

[79] On case law, see: M Devereux, J Freedman and J Vella, 'Tax Avoidance' (Oxford University Centre for Business Taxation, December 2012) 3–7. Some judges have attempted to do so. See for instance: *IRC v Willoughby* [1997] 4 All ER 65 (HL), [1997] STC 995, 1003h–1004a (Lord Nolan). On statutes, see: A Seely, 'Tax avoidance and tax evasion' (House of Commons Briefing Paper 7948, May 2019) 3. The General Anti-Abuse Rule legislation for instance does not define avoidance, but simply 'abusive' practices (see Finance Act 2013, s 207). The Disclosure of Tax Avoidance Schemes regime on the other hand uses hallmarks to define avoidance (see for instance Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (SI 2006/1543), reg 6).

[80] *Greenwich Property* (n 58).

[81] ibid [24]–[25].

[82] Institute of Chartered Accountants in England and Wales, 'Legitimate Expectation and Reliance on HMRC Guidance' (Technical Release 06/13) 14; *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC), [21].

[83] *R v Customs and Excise Commissioners, ex parte F & I Services Ltd* [2000] STC 364 (QBD).

[84] ibid 377; affirmed by Robert Walker LJ in the Court of Appeal: *F & I Services Ltd v Customs and Excise Commissioners* [2001] EWCA Civ 762, [2001] STC 939 [66].

non-final tribunal or court decision proves that taxes are not due, and vice versa. HMRC has the power to make mistakes and when it realises a potential mistake, its *obligation* is to consider its options.[85] It may be lawful to renege on prior commitments as in *Hely-Hutchinson*, but it may be lawful also to take other approaches.[86]

iii. Clarity

A legitimate expectation can only arise on the basis of HMRC advice which is of sufficient clarity. The manner in which this condition has been interpreted[87] opens it up to two alternate criticisms, however: that fulfilling the condition is exceedingly difficult; and/or that the requirements for its satisfaction are so malleable as to deprive HMRC advice of its normative, rule of law utility.[88] Both points can be best illustrated by examining the successful legitimate expectation cases, thereafter contrasting them with unsuccessful cases wherein conditions were implied into the advice. This detailed analysis of the case law also will serve the practical purpose of assisting taxpayers who are engaged in disputes with HMRC as to whether they can rely on HMRC advice.[89]

In *R v Inland Revenue Commissioners, ex parte Unilever plc*,[90] the question was whether HMRC could resile from its previous conduct, wherein over the course of 20 years it had accepted tax relief claims from taxpayers outside the statutorily prescribed period.[91] The Court of Appeal held that HMRC acted unlawfully by resiling from this trend, enforcing the time bar and denying the taxpayers claims for relief. The conduct on the part of HMRC had given rise to an unequivocal expectation that relief claims would be accepted beyond the statutory time period.[92] The case of *R (Cameron) v HMRC* ('*Cameron*')[93] concerned two seafarers who successfully contended that they were entitled to the seafarer's

[85] The Court of Appeal in *R v Hertfordshire CC Ex p Cheung* [1986] 3 WLUK 310 found that there was an implied discretion to reconsider cases which were decided on a mistaken view of the law. On which see: C Lewis, 'Judicial review: time limits and retrospectivity' [1987] *Public Law* 21.

[86] As with ESC A19, ESC B41 and COP26 noted at n 52.

[87] J Maugham, 'What can you legitimately expect?' (2013) 1114 *Tax Journal* 13, 13; K Smith and R Doran 'GSTS Pathology LLP: When do legitimate expectations end?' (2013) 1177 *Tax Journal* 16, 16. Many cases falter at this hurdle. For instance, *R (Corkteck) v HMRC* [2009] EWHC 785 (Admin), [2009] STC 1681; *MFK Underwriting* (n 9).

[88] The generality of the criteria for establishing a legitimate expectation has also been highlighted by the courts, see: *Nadarajah* (n 6) [67] (Laws LJ). See also Williams, 'Multiple Doctrines' (2016).

[89] There is another case not included here in which the taxpayer was successful in invoking the doctrine, namely, *R (on the application of GSTS Pathology LLP and others) v Revenue and Customs Commissioners* [2013] EWHC 1801 (Admin), [2013] STC 2017, which has been relied on in later cases. It is not mentioned here because at issue was an injunction, rather than substantive relief long term from the monies otherwise payable.

[90] *Unilever* (n 6).

[91] Income and Corporation Taxes Act 1988, s 393(11)(2).

[92] See also *R (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, [72]; cf P Sales and K Steyn, 'Legitimate expectations in English public law: an analysis' [2004] *Public Law* 564, 575.

[93] *Cameron* (n 32).

deduction from their earnings because they had relied upon guidance. The 'eligible period' for seafarer's deduction was calculated by reference to days of absence from the UK,[94] which in turn pivoted upon whether a person was absent the UK at midnight.[95] However, determining whether a seafarer was in or outside the UK, defined by a 12-mile radius, at midnight would be incredibly difficult and onerous to prove. To this end, a concession was issued in guidance published to seafarers whereby if the boat upon which the seafarer was present left its berth or anchorage prior to midnight, the seafarer would be taken to have left the UK.[96] HMRC contended that this concession would only apply where the ship was destined for another country.[97] The taxpayers' understanding was that this concession would apply regardless of whether the ship was ultimately destined for another country, but would be satisfied simply if it left the UK.[98] The guidance upon which they sought to rely read as follows:

> A day of absence from the UK is any day when you are outside the UK at the end of that day (midnight). We normally treat a vessel as having left the UK at the moment it leaves berth or anchorage, on a voyage which will take it outside UK territorial waters. Arrival times are treated in a similar way.[99]

Wyn Williams J found that this wording unequivocally provided that, once outside at midnight, the seafarer would be treated as being absent the UK.[100] It is difficult, from a reading of the text, to arrive at any other conclusion, and HMRC did not press this point. HMRC's case, in reality, pivoted upon whether this 'concession' was superseded by a subsequent, narrower concession.[101] In *Greenwich Property*,[102] the University of Greenwich had decided to create a new student residence. Half had been completed with the University's own funds, with the other half funded through a Private Finance Initiative (PFI). The PFI agreement prescribed that the accommodation would be let privately during the summer months. The applicant sought to rely upon a published concession[103] from HMRC to the effect that the building would be zero-rated,[104] notwithstanding the fact that students would not be the sole inhabitants of the residential accommodation. This published concession read as follows:

> Higher education institutions are in a peculiar position as they know that some use is likely to be made of student accommodation for non-qualifying purposes during vacations but such use is difficult to quantify. In the circumstances, because in any event tax

[94] Income Tax (Earnings and Pensions) Act 2003, s 378.
[95] Income Tax (Earnings and Pensions) Act 2003, s 378(4).
[96] *Cameron* (n 32) [22].
[97] ibid [34].
[98] ibid [42], [53].
[99] ibid [22].
[100] ibid [78].
[101] ibid [23]–[33], [63], [73]–[74], [82].
[102] *Greenwich Property* (n 58).
[103] Although not in the list of published ESCs.
[104] Value Added Tax Act 1994, Sch 8.

> will be collected in respect of this non-qualifying vacation use and provided that the new building is clearly intended primarily for use as student accommodation for ten years from the date of its completion, then we are content for higher education institutions to disregard the 10% de minimis rule and to issue a certificate for the construction or acquisition of such a building as 'relevant residential' building under Group 8 of the zero-rated schedule.

The thrust of the concession was that HMRC would treat the building as zero-rated if the University could demonstrate its primary use for ten years would be student accommodation.[105] HMRC contended that to fall properly within the terms of the concession, it was necessary for the University itself to rent out the property during the summer months and not the PFI provider.[106] Collins J rejected this on the basis that there could be no logical distinction between such an activity being undertaken by the University itself or a third party, and that both instances fell squarely within the terms of the concession.[107] Therein, however, Collins J highlighted the significant height of the threshold facing an applicant in a legitimate expectation claim. The taxable person must demonstrate that she has acted strictly in accordance with what the concession permits and has complied with all the conditions necessary to obtain the relief.[108] There can be *no* ambiguity:

> *Any doubt* should be resolved in favour of the tax being payable according to the statutory provision since, if there is doubt, or the language of the concession is ambiguous, the taxpayer should inquire of the Commissioners whether what he intends to do falls within the concession.[109]

Collins J allowed the concession to be relied upon given that there was no doubt as to the applicability of its terms in this case. There was no mention in the concession as to whether it was necessary or not for the University itself to rent out the accommodation in the summer months. As with *Cameron*, HMRC did not push the point. Rather, HMRC's overarching claim was that the concession was being utilised as a tool for tax avoidance.[110] This too was the case with *R (Biffa Waste) v Revenue and Customs*[111] where the main issue of the proceedings was not the clarity of the ruling which was given to the taxpayer, but whether that ruling applied only to the specific facts on which it was given or whether it could be applied to analogous situations (which the Administrative Court accepted it could).[112]

[105] *Greenwich Property* (n 58) [9].
[106] ibid [21].
[107] ibid [23].
[108] ibid.
[109] ibid [23]. Emphasis added.
[110] ibid [21]–[25]. Although generally provisos in HMRC publications ensure that they cannot be utilised for tax avoidance purposes, the Concordat to the CVCP contained no such qualification; see ibid [25].
[111] *Biffa Waste* (n 71).
[112] ibid [85]–[129].

R v Customs and Excise Commissioners, ex parte Kay,[113] meanwhile concerned the recovery of overpaid VAT by opticians. HMRC had made representations in a Business Brief[114] to the relevant taxpayers which stated that they were entitled to repayment of overpaid VAT:

> Any claims for repayment with statutory interest which date back to 1 September 1988 should now be submitted by opticians to their local VAT office, together with details of the apportionment used, where that is still to be agreed with the local office.

It was subsequently identified in the brief that any such claims should be made before 12 March 2001.[115] The Court held that this amounted to a clear representation upon which the taxpayers were entitled to rely.[116] As with *Cameron* and *Greenwich Property*, HMRC's contention that it was not bound by an expectation did not revolve around the terms of the publication, but on this occasion was based upon an understanding that legislation would later be introduced retrospectively to counter the repayment duties and as such ought not to be bound by the publication.[117]

In these cases, the advice contained assurances that the judges accepted as clear and to an extent it could be argued that HMRC too accepted this, given that it often had to explore fallback arguments separate from the issue of clarity. These cases are very much the exception to the rule: most cases will not overcome the 'no ambiguity' bar. This can be demonstrated by looking at cases wherein HMRC and the courts interpreted conditions or provisions *into* the relevant advice that were not apparent on first reading. In *Gaines-Cooper*,[118] the need for a 'distinct break' was read into HMRC's published material. The taxpayers claimed that HMRC guidance gave rise to a legitimate expectation that non-resident status would be acquired if the residence day count were satisfied (ie less than six months in any year were spent in the UK).[119] HMRC, on the other hand, contended that the taxpayers additionally needed to demonstrate a 'distinct break' with the UK.[120] The majority of the Supreme Court (Lord Mance dissenting) agreed with HMRC, notwithstanding that the guidance itself made no explicit reference to the concept.[121] Lord Wilson gave the leading speech and is seen in this following paragraph to interpolate such a meaning into the words of the guidance:

> [The] paragraphs [in the Guidance] must be read compendiously. *They shared one important feature: they all referred to 'visits' on the part of the individual to the UK*. If he

[113] [1996] STC 1500 (QBD) (Keene J).
[114] Customs and Excise, 'Business Brief 8/95' (May 1995).
[115] ibid; *Kay* (n 113) 1524.
[116] *Kay* (n 113) 1527.
[117] ibid 1515.
[118] *Gaines-Cooper* (n 7).
[119] ibid [30].
[120] ibid [79].
[121] ibid [30].

> usually resides in the UK, he will go abroad as a visitor but, if he has left the UK and has adopted a usual residence abroad, he will come to the UK as a visitor: *we are not visitors in the country of our usual residence*. The reference to visits to the UK therefore underlined the need for a change in the individual's usual residence and *therefore, by ready inference, for a distinct break* in the pattern of his life in the UK.[122]

Freedman and Vella described the majority's approach to the construction of HMRC's guidance in this case as 'questionable',[123] as regards its departure from the plain language of the text. The forced reasoning of Lord Wilson in the extracted piece supports this conclusion. It requires a linguistic double leap: first, to imply that the reference to visits brings to mind the idea that one cannot be a visitor in the country of one's usual residence and secondly, to imply that this, '*by ready inference*', requires a 'distinct break' from the UK.

Similar 'reading in' was initially successful in the case of *Ingenious Media*, which arose out of an episode where David Hartnett (then Permanent Secretary for tax at HMRC) disclosed the details of the investigation of particular taxpayers to journalists from *The Times*.[124] The taxpayers claimed that the exposure breached a legitimate expectation created by an HMRC Manual.[125] The relevant publication indicated that HMRC could disclose customer information for the purpose of an HMRC function, with examples provided such as:

- passing HMRC debt details to the Official Receiver in bankruptcy work;
- providing the police with details of a forthcoming visit so they can assess the health and safety risk (see IDG40460);
- making inquiries about a HMRC customer with a third party (see IDG30400);
- carrying out distraint in a public place.[126]

Being a non-exhaustive list, the Manual thereafter stressed that disclosure of information would be proper if this enabled HMRC to carry out its functions more effectively.[127] An *ejusdem generis* reading of the above examples, however, is highly unlikely to direct the reader to permit the disclosure of case-specific details to the media as occurred in that case. An example of a disclosure of the same order might be sharing taxpayer information with the media in order that journalistic investigations would not undermine a police raid,[128] which is a far cry from imparting

[122] ibid [42] (emphasis added).

[123] J Freedman and J Vella, 'Revenue Guidance: The Limits of Discretion and Legitimate Expectations' (2012) 128 *LQR* 192, 192.

[124] *R (Ingenious Media and McKenna) v HMRC* [2013] EWHC 3258 (Admin), [2014] STC 673 (*Ingenious Media* (HC)); *R (Ingenious Media and McKenna) v HMRC* [2015] EWCA Civ 173, [2015] STC 1357 (*Ingenious Media* (CA)); *R (Ingenious Media and McKenna) v HMRC* [2016] UKSC 54 [17], [2016] 1 WLR 4164 (*Ingenious Media* (SC)). This case is discussed in ch 4 in text at n 81.

[125] *Ingenious Media* (HC) (n 124) [28].

[126] ibid [25]; *Ingenious Media* (CA) (n 124) [35].

[127] *Ingenious Media* (HC) (n 124) [25]; *Ingenious Media* (CA) (n 124) [35].

[128] *Ingenious Media* (SC) (n 124) [35].

it generally to journalists because it may result in more efficient tax collection. The High Court and Court of Appeal nevertheless upheld HMRC's action as being in line with the Manual on the basis that it would bolster both relations between the media and HMRC and, in turn, the efficient collection of tax.[129] With a harmonious relationship would come a quid pro quo: the media would hand over evidence of tax avoidance to HMRC and the engagement would additionally ameliorate public confidence in the administration of the tax system.[130] That such disclosure is viewed as being of the same order as that of use for distraint and debt collection demonstrates the breadth of interpretation which the courts can potentially apply to HMRC advice. Of course, the Supreme Court ultimately held that HMRC's disclosure was unlawful,[131] but made no comment on HMRC's Manual, or whether the taxpayers could expect on the basis of information in the Manual that HMRC would not disclose information (though it can probably be inferred that the Supreme Court disagreed with the lower courts on the issue).

In *R (ELS Group) v HMRC*[132] an issue before the Court of Appeal was whether HMRC guidance could apply retrospectively. The relevant guidance, Business Brief BB4/10, contained a concession which limited the quantum of VAT a business had to charge when seconding its own staff. The court was required to construe the guidance in order to determine whether its terms were capable of being applied retrospectively (ie whether the taxpayer was entitled to rely at a later time upon the guidance, having failed at the relevant time to elect for the treatment under the guidance). HMRC contended that 'concessions should be given a relatively narrow construction in recognition of the fact that they involve a derogation from statute'.[133] This was accepted by Patten LJ, to whom it seemed 'that the most influential contextual element in the process of construction must be the statutory default position'.[134] As the guidance itself did not in clear words state that it could be applied retrospectively, the taxpayer could not be said to be entitled to the concessionary treatment. The fact that the concession operated:

> [I]n effect as a decision by HMRC not to collect tax that becomes statutorily due … militates strongly in my view against giving the concessions any greater scope than a fair and normal reading of the language of the concession dictates.[135]

Moreover, to extend the concession retrospectively to fit the current case would 'create an obvious inconsistency' with the relevant legislation 'and is a powerful reason why the concession should be assumed and interpreted not to have that effect'.[136] In brief then, the Court placed significant reliance upon the proper legal

[129] *Ingenious Media* (HC) (n 124) [44] and [60]–[61]; *Ingenious Media* (CA) (n 124) [30] and [37]–[47].
[130] *Ingenious Media* (HC) (n 124) [44].
[131] *Ingenious Media* (SC) (n 124).
[132] [2016] EWCA Civ 663, [2016] STC 2417.
[133] ibid [23].
[134] ibid [24].
[135] ibid [35].
[136] ibid [36].

position in order to determine the meaning and scope of the HMRC advice, even if this correct legal position was not actually mentioned in the advice itself.

On the one hand, it might be said that the successful cases demonstrate just how clear the advice must have been in order for the taxpayer to prevail in a legitimate expectation claim. But on the other hand, the cited unsuccessful cases might demonstrate an altogether different proposition – namely, that what is important is not the content of the advice itself, but the interpretation and interpretative methodology of the deciding judge. The argument that the advice should be understood in light of implied material is always open to HMRC.[137]

iv. Qualifications

In order to ground a legitimate expectation, the HMRC advice must be 'devoid of relevant qualification'. The sheer ubiquity of qualifications in general advice, rather than in individual advice, undermines this potential. For instance, many publications contain 'health warnings' in the form of: 'This Publication gives you information about X, and how HMRC interprets the legislation in the context of applying X to an individual's circumstances'.[138]

There is a clear trend of courts being inclined to find that such health warnings undermine the prospect of a legitimate expectation from arising. In the case of *Hanover Company Services Ltd v HMRC*,[139] the First-tier Tribunal (FTT) noted obiter that such a health warning *precluded* the creation of a legitimate expectation, though that puts the point too strongly.[140] Collins J in *Thompson v Fletcher*[141] more accurately summarised the problem as being that a 'health warning' can serve to vitiate the possibility of an expectation arising, as it makes it 'absolutely clear that readers should not be [*sic*] assume that the guidance is comprehensive'.[142] The issue of health warnings also came to bear in *Gaines-Cooper*. The majority of the Supreme Court held that the claim to a legitimate expectation could not be made out, partly because of the presence of a health warning.[143] The guidance upon which the applicants sought to rely was prefaced as follows:

> The notes in this booklet reflect the law and practice at October 1999. They are not binding in law and do not affect rights of appeal about your own tax. You should bear in mind that the booklet offers general guidance on how the rules apply, but whether

[137] Though this was not successful in *R (Vacation Rentals) v HMRC* [2018] UKUT 383 (TCC), where the Upper Tribunal opined that HMRC sought to advance an interpretation of the relevant guidance which was 'inappropriately technical and rigorous' ([76]).

[138] See for instance HMRC, 'RDR3 Statutory Residence Test' (August 2016).

[139] [2010] UKFTT 256 (TC).

[140] ibid [49].

[141] [2002] EWHC 1448 (Admin), [2002] STC 1149.

[142] ibid [47]. See also the cases prior and subsequent to *Hanover*. See: *Cameron* (n 32); *B&J Shopfitting Services v HMRC* [2010] UKFTT 78 (TC); *Kay* (n 113).

[143] *Gaines-Cooper* (n 7) [32] (Lord Wilson); [64] (Lord Hope); [66] (Lord Walker).

> the guidance is appropriate in a particular case will depend on all the facts of that case. *If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office*.[144]

Provisos to HMRC materials can provide much the same effect. These are found, for instance, attached to HMRC's published list of ESCs which provides that concessions will not be given in any case where an attempt is made to use them for tax avoidance.[145] This proviso resulted in an ESC not applying to a taxpayer in the case of *R v Inspector of Taxes, ex parte Fulford-Dobson*[146] as the court held that the taxpayer was attempting to use the concession for avoidance purposes.[147] In dismissing the taxpayer's contention that a legitimate expectation arose on the basis of representations in an HMRC Manual, the Upper Tribunal in *Samarkand*[148] placed significant weight on a caveat precluding reliance where 'there is, or may be, avoidance of tax'.[149] It followed that the taxpayers had to take the Manual in its entirety and could not 'take out the plums they liked and ignore the duff they did not'.[150] The Court of Appeal noted that the guidance was 'permeated with qualifications relating to tax avoidance'[151] and agreed with the Upper Tribunal's reasoning on the point.[152]

v. Access

Access to the tribunals and courts is also an obstacle to the protection of taxpayers from HMRC reneging on written representations. Access is circumscribed by the requirement that a claim based on legitimate expectations be brought in the High Court rather than the FTT,[153] costs and the scope for judicial review applications.

For a time, there was considerable uncertainty as to the scope of the tribunal's power to hear issues of public law.[154] In *Oxfam v HMRC*,[155] Sales J (as he then was) embarked on an analysis of analogous case law relating to the jurisdiction

[144] ibid [32] (Lord Wilson) (emphasis added).
[145] HMRC, 'Concessions as at 6 April 2018' (n 52) 2.
[146] [1987] BTC 158 (QBD).
[147] ibid 166–69. See also: *R (Bampton) v King* [2012] EWCA Civ 1744, [2014] STC 56 [109] (Arden LJ).
[148] *Samarkand Film Partnership No 3, Proteus Film Partnership and three partners v HMRC* [2015] UKUT 211 (TCC), [2015] STC 2135.
[149] ibid [154].
[150] ibid [172].
[151] *Samarkand* (CA) (n 59) [126].
[152] ibid [114], [124] and [130].
[153] It should be noted that where it is 'just and convenient' to so do, the Administrative Court may transfer the case to the Upper Tribunal, as occurred for instance in *R (Capital Accommodation (London)) v HMRC* [2012] UKUT 276 (TCC), [2013] STC 303, but was refused in *R (Hankinson) v HMRC* [2009] EWHC 1774 (Admin), [2009] STC 2158.
[154] Differently constituted tribunals arrived at differing conclusions upon this matter. See: *HOK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 433 (TC). Cf *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TCC), [2013] STC 225.
[155] [2009] EWHC 3078 (Ch), [2010] STC 686.

of similar tribunals and also the relevant statutory wording, before concluding that the FTT had jurisdiction to hear public law matters. However, this judgment has been later refined as only relating to the determination of input tax for the purposes of section 83(c) of the Value Added Tax Act 1994.[156] The result now is that a taxpayer will have to commence judicial review proceedings in the High Court, as well as pursue the substantive case in the tax tribunal.[157] This resulting duplication has been criticised by John Avery Jones:[158]

> I do not see this as a matter of principle. The High Court certainly has power to review all exercises of discretions by Customs for those who can afford to go there; why should not the Tribunal if they are qualified to decide the more difficult substantive part of the appeal?[159]

It is certainly questionable why an expert tribunal cannot determine all the issues surrounding a case which comes before it.[160] One could counter that it is necessary to ensure that public law issues are dealt with at a higher level due to the fact that the FTT is not constituted wholly by judges.[161] However, there is a certain air of 'fig leaf'[162] logic to the argument, considering that in the case of some taxing provisions, the tribunal does in effect decide upon public law issues. For instance, the tribunal will take account of excess of jurisdiction, unlawfulness or impropriety on the part of HMRC when evaluating the reasonableness of a taxpayer's excuse for avoiding a penalty.[163] Indeed, as the author has pointed out the tribunal considers issues in respect of all the grounds of judicial review thereby underlining its competence to hear public law claims.[164]

The practical ramifications of having to commence judicial review in the High Court were highlighted in *William Bourne v HMRC*.[165] For the ordinary taxpayer, without the benefit of representation, the requirement to commence dual proceedings is 'tantamount, in practice, to denying that appellant the ability to pursue that claim'.[166] The unrepresented taxpayer is unlikely to go to the expense of funding two sets of proceedings,[167] and may be unaware of the relevant procedure,

[156] *Rotberg v HMRC* [2014] UKFTT 657 (TC).

[157] Even in the case of Value Added Tax Act 1994, s 83(c) Sales J in *Oxfam* recommended that taxpayers should still take this duplicative route, see: *Oxfam* (n 155) [80].

[158] JA Jones, 'The reform of the tax tribunals: a story of uncompleted business' [2006] *British Tax Review* 282, 291–93.

[159] ibid 291.

[160] See ch 7 in text at n 295.

[161] As per The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008, s 2(2) and (4), members of the First-tier Tribunal may be non-judges who are accountants or who have substantial experience in tax matters.

[162] This phrase is borrowed from J Laws, 'Law and democracy' [1995] *Public Law* 72, 79.

[163] Jones, 'The reform' [2006] 291, fn 54.

[164] S Daly, 'Public Law in the Tax Tribunals and the Case for Reform' [2018] 1 *British Tax Review* 94.

[165] [2010] UKFTT 294 (TC).

[166] ibid [24].

[167] E Troup, 'Unacceptable Discretion: Countering Tax Avoidance and Preserving the Rights of the Individual' (1992) 13 *Fiscal Studies* 128, 134.

namely that the taxpayer must institute judicial review proceedings within 90 days of HMRC's decision,[168] and should simultaneously stay these proceedings behind the substantive appeal.[169]

In practical terms, cost is perhaps the greatest obstacle to a taxpayer seeking to advance a legitimate expectation claim. Proceedings must be commenced in the High Court (Administrative Court).[170] The cost of commencing judicial review proceedings (now £154), of requesting a reconsideration a judicial review application at a hearing (£385)[171] and of pursuing the claim if permission is granted (now £770)[172] is prohibitive generally and will almost completely deter persons with disputes worth under £1,000. The Court has discretion also to award costs against an unsuccessful judicial review applicant.[173] Where the Court decides to make an order, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.[174] Litigants may apply to the Court to have their judicial review case heard by the Upper Tribunal,[175] but the Court must be satisfied that transferring the case would be 'just and convenient'.[176] In any event, costs can also be awarded against the losing party[177] and the same costs-shifting rule which operates in the High Court probably also applies given that the Upper Tribunal in such an instance is exercising concurrent jurisdiction.[178] The extent to which some Court fees can be avoided meanwhile depends upon when, in the litigation, the case is transferred to the Upper Tribunal. On the other hand, there is currently no fee for taking a case to the First-tier Tax Tribunal and each side generally bears its own costs.[179]

Finally, section 84 of the Criminal Justice and Courts Act 2015 has the effect of introducing another barrier to access for claimants. This provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the Court to be *highly likely* that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred

[168] CPR 54.5.

[169] Ministry of Justice, 'Pre-Action Protocol for Judicial Review' para 5.

[170] Senior Courts Act 1981, s 31.

[171] Generally a necessity given that most Judicial Review applications are refused on paper, see: Ministry of Justice, 'Judicial Review: Proposals for further reform' (September 2013) 8.

[172] See HM Courts and Tribunals Service, 'EX50A: 24 July 2018' (July 2018) 4.

[173] Senior Courts Act 1981, s 51 and CPR 44.2.

[174] Judiciary for England and Wales, 'The Administrative Court Judicial Review Guide 2018' (July 2018) para 23.1.2.

[175] Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), ss 15–21.

[176] Senior Courts Act 1981 s 31A(3); TCEA 2007 s 19(1).

[177] See TCEA 2007, s 29; The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 (L 15)), r 10(3)(a).

[178] Senior President of Tribunals, 'Costs in Tribunals: Report by the Senior President of Tribunals' (December 2011) para 138.

[179] For a helpful overview, see: A Keats, 'When to claim costs at a tax tribunal', *AccountingWeb* (8 February 2019). See The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L 1)), r 10 for when costs can be awarded.

(although the Court retains a discretion to grant relief for reasons of exceptional public interest).[180] The same applies to the permission stage, although this only arises where the defendant brings the motion, or where the Court decides this of its own motion, that the outcome would have been substantially the same.[181] It is the words 'highly likely' which are at issue. Previously judges had a discretion to refuse relief where the same outcome would have been 'inevitable', a much higher standard.[182] The amendment was significantly criticised, most notably by Lord Pannick, whose *Times* article on the issue[183] became a focal point for the debate as the bill passed through the houses.[184]

It could be argued that although this amendment is undesirable from the perspective of reducing the scope for holding public authorities to account in respect of unlawful actions,[185] the private rights of claimants are unaffected. In other words, if the claimant can demonstrate a right to a remedy which is more than nominal, the case will still proceed and, to this end, the amendment should not hinder access to the courts for taxpayers seeking to hold HMRC to its advice (given that taxpayers claims' should generally be for non-nominal remedies). This, however, is to overlook the obfuscating nature of the amendment. Judicial review targets generally the propriety of the decision-making process, and only exceptionally, for instance where unreasonableness is demonstrated, the decision itself. By reducing the standard to 'highly likely' from 'inevitable', the judge is forced to consider in outline the merits of the decision and to place herself in the shoes of the decision-maker, hypothesising whether it was highly likely that she too would arrive at the same decision.[186] By introducing this possibility, it increases the scope for the judge to decide that the claimant's action should be dismissed. The consequence of the change is to make it more difficult for a claimant to bring an action and to seek relief.

B. Using the ECHR and EU Law

In order to be comprehensive, it should be mentioned that as a matter of public law, there are additional options that can be pursued by taxpayers in order to seek

[180] Criminal Justice and Courts Act 2015, s 84(1). See Senior Courts Act 1981, s 31(2A) and (2B).

[181] Criminal Justice and Courts Act 2015, s 84(2). See Senior Courts Act 1981, s 31(3D). Here the court may disregard the requirement for reasons of exceptional public interest. See Senior Courts Act 1981, s 31(3E).

[182] In respect of taking into account irrelevant considerations for instance, see *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444 [67] (Elias LJ).

[183] D Pannick, 'Why judicial review needs protection from our politicians' *The Times* (20 February 2014).

[184] See, for instance, *Hansard*, HC Deb Vol 582, col 697 (17 June 2014) (Andy Slaughter); *Hansard*, HL Deb Vol 754, col 1557 (30 June 2014) (Baroness Campbell).

[185] And, in this sense, the amendment ignores the 'plurality of purposes' served by judicial review: S Nason, *Reconstructing Judicial Review* (Oxford, Hart Publishing, 2016) 15.

[186] *Hansard*, Criminal Justice and Courts Bill Deb col 106 (13 March 2014) (Angela Patrick); *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (Admin), [2016] PTSR 1455 [86] (John Howell QC).

to enforce legitimate expectation claims against HMRC. Most notably, taxpayers can seek to invoke the ECHR and EU law. However, it should be made clear that an argument which fails on the common law legitimate expectation claim will most likely derive little benefit from these routes.[187]

Article 1 of the First Protocol to the ECHR protects the 'peaceful enjoyment of possessions', within which a claim for a substantive legitimate expectation can be made. However, Article 1 Protocol 1(2) is deferential towards signatory states in respect of tax. It provides that deprivation of possessions may be justified 'in the public interest', as provided by law. In particular, states are entitled 'to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. There are, accordingly, significant hurdles for a taxpayer seeking to invoke the ECHR in order to advance a legitimate expectation claim in respect of HMRC advice – the first is demonstrating that she comes within the scope of the provision by holding a 'possession'; the second is finding the infringement not to be justified; and the third is that, even if justified, she must demonstrate that any such justification is not proportionate.

A legitimate expectation claim must be incidental to a property right in order for it to garner the protection of the First Protocol.[188] Thus, if a property right is present,[189] for instance such as a right to recover input tax,[190] a claim to a legitimate expectation can be considered.[191] But the problem lies in demonstrating that a sufficiently strong claim in law is present so as to amount to a 'possession'.[192] Demonstrating such a strong claim only brings us back to the question of whether a legitimate expectation is made out as a matter of national law, thereby essentially adding nothing to the common law protection. However, assuming that one can be made out, the ECHR will generally not assist beyond what the common law legitimate expectation doctrine can provide. This is because HMRC will be justified in reneging on a legitimate expectation if it does so in order to secure the payment of tax and will have little difficulty in an ordinary case demonstrating the action to be proportionate given that national authorities are afforded 'a wide margin

[187] This aligns with what might be at least the anecdotal observation that litigants are better advised to ground arguments generally in established administrative and constitutional law principles. In this context, Dinah Rose has said that '[Blackstone's commentaries get] much more purchase with a common law judge in many occasions than the human rights act'. See 'Magna Carta: Myth and Meaning' discussion from 19.28, available at: www.intelligencesquared.com/events/magna-carta-myth-and-meaning. For instance, see *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2018] 1 CMLR 35, where the constitutional principle of access to justice arrived at the same result as EU law ([66]–[85] and [89] in particular (Lord Reed)).

[188] *Prince Hans-Adam II of Liechtenstein v Germany* (42527/98) [2001] ECHR 463, para 83.

[189] See *R (on the application of Carvill) v IRC* [2003] STC 1539 (QBD) [49].

[190] On which, see *Bulves AD v Bulgaria* (3991/03) [2009] STC 1193; *Aleena Electronics Ltd v HMRC* [2011] UKFTT 608 (TC) [38]–[44].

[191] It may even be contested in the First-tier Tribunal rather than the High Court, as was tried in *Aleena Electronics Ltd v HMRC* [2011] UKFTT 608 (TC).

[192] For a helpful recent overview of what amounts to a possession in the context of tax, see: *R (on the Application of Rowe and Others) v HMRC; R (on the Application of Vital Nut Co Ltd and Others) v HMRC* [2017] EWCA Civ 2105, [2017] WLR(D) 830 [158]–[185] (McCombe LJ).

of appreciation',[193] particularly in tax cases.[194] Cases that have succeeded on the proportionality ground have involved an interference 'so burdensome, arbitrary, unfair or excessive, relative to any community or public interest, as to preclude its being regarded as reasonably founded'.[195] Take, for instance, the case of *R.Sz v Hungary.*[196] There the taxpayer was among a group of persons singled out for additional taxation, some time after the original receipt of the monies, leading to almost total deprivation of the money received.

The principle of legitimate expectation in EU law,[197] meanwhile, can assist taxpayers where the claim concerns EU law, for instance because the relevant HMRC advice relates to VAT or the Directive on Administrative Cooperation.[198] The EU doctrine of legitimate expectations protects an individual in a situation in which a relevant public body gives precise, unconditional and consistent information, in whatever form, thereby leading that individual to entertain well-founded expectations.[199] This definition does not appear to provide anything of substance to differentiate it from the common law doctrine.[200]

However, beyond that provided by common law, the EU doctrine may be of assistance to taxpayers as it potentially provides greater reliability for expectations predicated on incorrect advice, though this depends on the particular error. In *Elmeka NE v Ypourgos Oikonomikon*,[201] the taxpayer received an assurance from the Greek tax authority that its supply of services was exempt from VAT, though this was incorrect. The Court of Justice noted that the doctrine of legitimate expectations formed part of the EU legal order.[202] The taxpayer's expectation would be binding on the Greek Government, subject to the national court determining whether the taxpayer could reasonably have believed that the public authority which provided the incorrect advice was competent to rule on the application of the exemption to its activities.[203] The question of competence here was particular to the facts as the Greek Government argued that the organ of the tax authority which provided the advice was not the correct department to which requests for advice were to be directed.

[193] See for instance, *AXA* (n 53) [126] (Lord Reed).
[194] *Rowe and Vital Nut* (n 192) [197] (McCombe LJ).
[195] See also *Allan v HMRC* [2015] UKUT 16 (TCC) [52] (Barling J).
[196] [2013] ECHR 628, [2013] ECHR 41838/11.
[197] Cases C-181/04 to C-183/04 *Elmeka NE v Ipourgos Ikoomikon* [2006] ECR I-8167, para 31.
[198] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1.
[199] Joined cases C-630/11 P to C-633/11 P *HGA and Others v Commission* (ECJ, 13 June 2013) para 132. See also Case C-289/91 *Mavridis v Parliament* [1983] ECR 1731, para 21.
[200] See for instance *Infinis Energy Holdings Ltd v HM Treasury* [2016] EWCA Civ 1030, [2017] STC 414. For an in-depth discussion of the EU law on legitimate expectations, see: P Craig, *EU Administrative Law*, 3rd edn (Oxford, Oxford University Press, 2018) ch 18. See also T Tridimas, 'Indeterminacy and legal uncertainty in EU law' in J Mendes (ed), *EU Executive Discretion and the Limits of the Law* (Oxford, Oxford University Press, 2019).
[201] Cases C-181/04 to C-183/04 *Elmeka NE v Ypourgos Oikonomikon* [2006] ECR I-8167.
[202] ibid para 31.
[203] ibid paras 35–36.

The judgment of the Court should be read alongside the Advocate General's opinion in the case, which elaborates upon the narrow circumstances which led to this outcome.[204] She noted that the same result would not be arrived at where the underlying error related to community law which is unambiguous.[205] Nor where the community law in question, which has been misconceived in the advice, is that of 'general interest' in the sense that Member States have no natural vested interest in the correct application of the Community rules concerned.[206] State aid, for instance, is an example where the rules only work if all Member States act scrupulously in implementing them, whereas there is a perceived economic incentive conversely for Member States not to apply them in individual instances. The integrity of the Schengen area provides another example of a general interest situation where deviations have an impact across Member States rather than being internal to a single state.[207] This case, however, concerned VAT, and more particularly, it concerned a trader who believed its supplies to be exempt. Had these not been exempt, the trader would simply have passed on the charge to the consumer (subject to price elasticity). In sum then, beyond the protection provided by the common law doctrine of legitimate expectations to taxpayers seeking to hold HMRC to its advice, the ECHR can only provide assistance in extreme circumstances. Meanwhile, EU law will be helpful only in situations where HMRC advises in relation to EU law in which it is competent,[208] the relevant law is not unambiguous and honouring the incorrect advice does not have an impact on the scope or effectiveness of EU law.[209]

Finally, it should be noted that the ECHR and EU law may assist in respect of retrospective changes in advice where this is done because of a change in the law. As noted in respect of the ECHR,[210] the rule of law requires that laws be foreseeable and accessible, with respect to which retrospective changes in law necessarily conflict.[211] EU law similarly guards against retrospective changes as these conflict with the principle of legal certainty.[212] A detailed discussion of these options, however, is outside the scope of this book as, in both instances, the taxpayer will in reality have to attack the change in law rather than HMRC's change of position in light of the law.

[204] Cases C-181/04 to C-183/04 *Elmeka NE v Ypourgos Oikonomikon* [2006] ECR I-8167, Opinion of AG Stix-Hackl.

[205] ibid para 45. See also cases Cases C-31/91 to C-44/91 *Alois Lageder SpA v Amminiistrazione delle Finanze dello Stato* [1993] ECR I-01761, para 35.

[206] ibid.

[207] See on this Case C-606/10 *Association nationale d'assistance aux fronteires pour l'etrangers (ANAFE) v Ministre de l'Interieur, de L'Outre-mer, des Collectivites territoriales et de l'Immigration* (ECJ, 14 June 2012).

[208] Namely, procedural and substantive tax laws as opposed to laws which it is not tasked with administering, such as the state aid rules.

[209] Case 210/87 *Remo Padovani and the successors of Otello Mantovani v Amministrazione delle finanze dello stato* [1988] ECR 6177 para 22.

[210] See ch 3 in text at n 102.

[211] *Axa* (n 53) [119] (Lord Reed).

[212] Case 98/78 *Firma A Racke v Hauptzollamt Mainz* [1979] ECR 69, para 20.

III. Private Law

For the sake of completeness, it should be noted there are remedies in private law which in theory could assist a taxpayer in holding HMRC to its advice, but these are underdeveloped for this purpose. The most notable is estoppel.[213] This provides broadly that a party, including for our purposes a public authority, can be estopped from resiling from an earlier commitment to another party because it would be unjust or inequitable to do so.[214] However, this is much narrower and less developed than the legitimate expectations doctrine. Indeed, as Bradley, Ewing and Knight have noted, it is 'not likely to be of any utility in the near future'.[215] The oft-cited statement from Lord Hoffmann in *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd*[216] in particular drives such pessimism. Although the private law concept of estoppel was helpful in the development of the doctrine of legitimate expectations, its reserves for that purpose have been exhausted:

> It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.[217]

There are several key limitations to the use of estoppel for present purposes which demonstrate that its scope is far narrower than the doctrine of legitimate expectations. First, the claimant must show generally show detriment,[218] whereas as noted already this is not the case with legitimate expectations. This is because public law forces the relevant public authority to take into account a broader range of factors, such as the interests of the general public, when exercising its powers.[219] Second, estoppel cannot be allowed where it would require a public body to act outside its powers,[220] and even more problematically cannot be used to estop a public authority from exercising a statutory discretion or performing a public duty.[221] This will prove fatal for a taxpayer where HMRC argues that more tax is due than

[213] Others would include negligent misstatement, but only very specific circumstances would assist for this cause of action, as the taxpayer would need to demonstrate a 'special relationship'. On this, see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), [1963] 2 All ER 575. See more generally, G Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Oxford, Hart Publishing, 2016) chs 9 and 10.

[214] *Moorgate Mercantile Co. Ltd v Twitchings* [1976] 1 QB 225 (CA), 241 (Denning MR).

[215] A Bradley, K Ewing and C Knight, *Constitutional & Administrative Law*, 17th edn (Harlow, Pearson Education, 2018) 667.

[216] [2002] UKHL 8, [2002] 4 All ER 58.

[217] ibid [35].

[218] For instance *Fisher v Brooker* [2009] UKHL 41, [2009] WLR 1764 [63] (Lord Neuberger). For a strong exploration of this issue see: E Cooke, *The Modern Law of Estoppel* (Oxford, Oxford University Press, 2000) ch 6.

[219] *Reprotech* (n 216) [34].

[220] *Minister of Agriculture and Fisheries and Food v Matthews* [1950] 1 KB 148, 153 (Cassels J); *Vestry of the parish of St. Mary, Islington v Hornsey Urban District Council* [1900] 1 Ch 695, (CA) 704–705; Craig, *Administrative Law* (2016) 705.

[221] *Reprotech* (n 216) [35].

had earlier been communicated, as HMRC in such an instance is simply carrying out the statutory function of collecting taxes.[222]

IV. Non-court Remedies

If there were a triangle representing legal disputes, it would only be those at the apex of the wedge which actually make it to litigation. Many more disputes are settled at a much earlier stage. Where a dispute arises in relation to reliance on HMRC advice, taxpayers should first seek to resolve the issue with HMRC directly.[223] HMRC will have another look at the decision and if the taxpayer is still unhappy with the outcome, then a different official independent of the original decision-maker will review the complaint and give a final response.[224] This 'second look' is known as internal review and has proved to be not unfavourable for taxpayers, with 49 per cent of reviews in 2013/14, for instance, resulting in HMRC's decision being cancelled or varied.[225]

If a taxpayer is still unhappy, she may approach the Adjudicator and if still unhappy can be referred by her local MP to the Ombudsman. The Adjudicator and Ombudsman may recommend a range of remedies.[226] The Adjudicator may recommend ex gratia payments, recompense and other payments to complainants such as covering expenses incurred in pursuing complaints and compensation for loss of time in pursuing complaints. HMRC generally agrees to implement recommendations, other than in exceptional circumstances or where the recommendation would require HMRC to depart its published standards, guidance and codes of practice.[227] The Ombudsman has broader jurisdiction and may recommend a wide range of remedies, from the issuance of an apology[228] to financial compensation,[229]

[222] See *GUS Merchandise Corporation Ltd v Normal Motor Factors Ltd* [1978] VATTR 20; *Animal Virus Institute v The Commissioners* [1988] VATTR 56 (cited in Cooke, *Estoppel* (n 218) 137, fn 137).

[223] HMRC, 'Complain about HMRC. To see who deals with the different disputes, see: HMRC, Code of governance for resolving tax disputes' (October 2017).

[224] This is a statutory process, though the particularities may depend on the type of tax. See for Taxes Management Act 1970, ss 49A–49I; Oil Taxation Act 1975, Sch 2, paras 14A–14I; Inheritance Act 1984, ss 223A–223I. See further P Hamilton, *Hamilton on Tax Appeals* (West Sussex, Bloomsbury Professional, 2016) ch 9.

[225] M Boddington, 'Taxpayers should take up internal reviews' *Accountingweb* (19 May 2016). The article cites statistics in 'HMRC's Reviews and Appeals – 2013–14'.

[226] See ch 5 in text at n 119.

[227] The Adjudicator's Office, HMRC and VOA, 'Service Level Agreement for the provision of complaints adjudication services for HM Revenue & Customs and Valuation Office Agency by the Adjudicator's Office' (July 2018) paras 5.19–5.20.

[228] Parliamentary Commissioner for Administration, 'Third report of the parliamentary commissioner for administration' (HC 1973–74, 281) 12; Parliamentary Commissioner for Administration, 'Annual report for 1988' (HC 1988/89, 301) 16; Parliamentary and Health Service Ombudsman, 'Annual Report 2010–11' (HC 2010–11, 1404) 17.

[229] Parliamentary Commissioner for Administration, 'Second report of the Parliamentary Commissioner for Administration' (HC 1973–74, 106) 7.

which seek to restore the complainant to the position she would have been in had the maladministration not occurred.[230] Though as noted already[231] neither body is vested with formal powers to bind HMRC to its recommendations, a review of case studies from the Adjudicator and Ombudsman reveals that they can be effective in holding HMRC to its advice.[232] This is despite the fact that neither body is in theory supposed to investigate complaints where a legal remedy, such as a claim based on legitimate expectations, is available.[233] Moreover, the case of *R (Bradley) v Secretary of State for Work and Pensions*[234] adds some legal force to recommendations from the Ombudsman and Adjudicator.[235] HMRC should only reject the findings of either body if there are 'cogent reasons'[236] for doing so and the courts may quash the rejection if it is deemed to be irrational.[237]

A. The Adjudicator

The Adjudicator is more constrained in the remedies that can be issued than the Ombudsman and regularly repeats that the Office has 'no jurisdiction to ask HMRC to act outside of their guidance or instructions'.[238] But this does not prevent the Adjudicator from holding HMRC to its advice, or at least compensating taxpayers, even where the advice is incorrect. This is because HMRC may have a practice or policy of following incorrect advice. For instance, HMRC guidance provides that persons may be entitled to compensation for reasonable costs directly caused by their mistakes or delays.[239] Thus in a case study from the Annual Report 2012, a company complained that HMRC's National Advice Service had given misleading advice.[240] Initially HMRC did not accept it had made any errors for which redress should be considered. The Adjudicator asked for a further independent review to be undertaken. In addition, she asked one of her investigators to obtain and listen to recordings of the two telephone calls made to the NAS. Having reviewed

[230] Parliamentary and Health Service Ombudsman, 'Equitable Life: a decade of regulatory failure' (HC 2007–08, 815-I) 377.

[231] See ch 5 in text at nn 137, 152 and 119.

[232] On the utility of the Ombudsman see also Weeks, *Soft Law* (2016) ch 12, who arrives at a similar conclusion.

[233] See Parliamentary Commissioner Act 1967, s 5(2), though there is an exception where the Commissioner believes it to not be reasonable to expect the citizen to pursue proceedings in a court or tribunal. Adjudicator, HMRC and VOA, 'Service Level Agreement' (n 227) para 5.12 provides that the Adjudicator cannot look at issues that the courts could have considered or could consider.

[234] [2008] EWCA Civ 36, [2009] QB 114.

[235] See ch 5 in text at n 152.

[236] *Bradley* (n 234) [51], [72] (Sir John Chadwick).

[237] ibid [95] (Sir John Chadwick).

[238] See, for instance, Adjudicator's Office, 'Annual Report 2012: A year of challenges' (July 2012) 13. See Adjudicator, HMRC and VOA, 'Service Level Agreement' (n 227) paras 5.1, 5.2 and 5.20 on the scope of the Adjudicator's remit to that end.

[239] See HMRC, 'Complain about HMRC'.

[240] Adjudicator's Office, 'Annual Report 2012' (n 238) 17.

this evidence, the Adjudicator found that a mistake had been made by HMRC and recommended that the body pay the costs arising from the misleading advice. HMRC agreed and, as an aside, also issued an apology for its poor complaints handling. Moreover, HMRC does have a policy of following its incorrect advice (as has already been set out) provided that the taxpayer can satisfy HMRC's strict tests, which notably includes demonstrating financial detriment. Where HMRC provided an assurance to taxpayers who traded in a partnership that their supply of tuition services was VAT exempt and later tried to go back on the advice (on the basis that in fact a third party provided the tuition on behalf of the partners), the Adjudicator upheld the complaint on the basis that the taxpayers would suffer detriment if held to the correct legal position.[241]

A case study from the Annual Report 2010 serves to bear out, meanwhile, that the Adjudicator is capable of holding HMRC to its general advice, regardless of whether the taxpayer has sought to rely on it (much as the doctrine of legitimate expectations also ensures consistency of administrative action). HMRC gave up tax otherwise payable in respect of Mr F, whose difficulties began when he retired and took a part-time job in 2003.[242] His PAYE personal allowances were duplicated for both sources of income. In November 2006, Mr F received tax calculations for 2004–05 and 2005–06, showing significant amounts of tax owing. Mr F then instructed an accountant who wrote to HMRC, but HMRC took a long time to give a detailed reply. The Adjudicator recommended that HMRC should not pursue the underpayments of tax as it was not reasonable to assume that Mr F should have been able to work out that he had not been paying enough tax, particularly as he had not received any tax codes for those years. This money was payable as a matter of law, but the Adjudicator was relying upon HMRC guidance (ESC A19).

These examples serve to demonstrate that the Adjudicator is a useful option for taxpayers. However, its utility from the perspective of holding HMRC to its advice should not be overstated. First, its remit is restricted and in the examples above the Adjudicator should not in fact have considered the issues given that a remedy in the courts on the basis of the doctrine of legitimate expectations would have been available. More problematically, the remedies that are available are 'soft' rather than 'hard' in the sense that should HMRC disagree with the Adjudicator's recommendation then it would be necessary to go to court to seek its enforcement.

B. Ombudsman

The reports of the Ombudsman are also replete with examples of the body holding HMRC to its advice. The 'Annual report for 1990' provides two such examples.[243]

[241] See for instance Adjudicator's Office, 'Annual Report 2006' (2006) 34–35.

[242] Adjudicator's Office, 'Annual Report 2010 continuous improvement driving performance learning lessons' (September 2010) 19.

[243] Parliamentary commissioner for administration, 'Annual report for 1990' (HC 1990–91, 299) 14.

HMRC's practice on reimbursing taxpayers for expenses arising by reason of official error on the part of the department is set out in general HMRC advice.[244] In one case, the Ombudsman found that a solicitor's costs fell squarely within the terms of the concession and the department agreed to reimburse the expense. In another case, the Ombudsman found that a taxpayer fell within the terms of a concession relating to sick pay (the now obsolete ESC A26),[245] but the department had overlooked to apply it in the case at hand. It was agreed that the complainant should be endowed with an ex gratia payment totalling £96.

The Inland Revenue's refusal to apply another concession, namely ESC A19, which forgives tax where there are delays on HMRC's part, to cases which fell within its terms came in for much criticism in the 'Annual report for 1991'.[246] The Ombudsman's opposing opinion that the taxpayers concerned did actually fall properly within the terms of ESC A19 was sufficient to provoke the Inland Revenue to give the taxpayers the benefit of the concession.[247] In one case, the Revenue had initially refused to apply the concession because a separate governmental department, the Department of Social Security (DSS),[248] caused the delay. The DSS had acquiesced in its duty to pass information concerning the state pension to the Inland Revenue. After the Ombudsman's intervention, the Inland Revenue agreed to compensate the taxpayer to the tune of £598.14. In a similar case, the taxpayer had been aware that the DSS had this arrangement with the Inland Revenue and accordingly relied upon this mechanism, rather than informing the Inland Revenue himself of his state pension. The Ombudsman recommended that the taxpayer obtain the benefit of the concession for the delay caused, again by the DSS's tardiness in passing on information. He received an exceptional ex gratia payment of £975.

Given that the remit of the Ombudsman's jurisdiction is to investigate complaints of *maladministration causing injustice*, the Ombudsman may recommend that an individual be compensated to produce an effect equivalent to an incorrect, more favourable tax assessment to which the taxpayer thought she was entitled.[249] To this end, where HMRC provides advice to a taxpayer which is incorrect as a matter of law, the Ombudsman may recommend that the taxpayer be compensated to in effect put that taxpayer in the position as if the incorrect position continued to apply. In one case, for instance, a taxpayer was compensated for failure on the part of a Customs and Excise officer to advise him of a

[244] Initially, it was set out in Statement of Practice A31, which was replaced by Code of Practice 1 on 17 February 1993.

[245] Rendered obsolete in 1999, see: Inland Revenue 'IR1' (August 1999).

[246] Parliamentary Commissioner for Administration, 'Annual report for 1991' (HC 1991–92, 347).

[247] ibid 13–14.

[248] Now has been subsumed within the Department for Work and Pensions.

[249] See: Parliamentary Commissioner for Administration, 'Annual report for 1986' (HC 1986/87, 248) 11 noted in HWR Wade and C Forsyth, *Administrative Law*, 11th edn (Oxford, Oxford University Press, 2014) 285.

more 'tax efficient' way of structuring the refurbishment of his house.[250] VAT relief was available for DIY house-builders who had built a new dwelling, but was not available for reconstructions. The complainant had incorporated an old building in a new structure (which would not qualify for the relief) but the Customs and Excise office gave the impression that it might be available and failed to intervene when it became apparent that the complainant was under a false impression. The Department compensated the taxpayer to the tune of £961.67 (representing the VAT paid on the building materials) thereby effectively arriving at the result the taxpayer had hoped, notwithstanding the fact that the taxpayer clearly did not come within the scope of the law properly applied.

The efficacy of the Ombudsman in holding HMRC to its advice, whilst helpful, also suffers similar shortcomings to that of the Adjudicator. Its remedies are 'soft' as evidenced by *Bradley* in that the claimant in that case had to take the relevant body to court in order for the body to be bound by the decision of the Ombudsman. Secondly, its remit is limited to issues of maladministration which cannot be resolved in the court, a limitation which is built into its jurisdiction in order, at least in principle, to separate issues of law from administration.[251]

V. Conclusion

For HMRC advice to guide taxpayers as to the legal consequences of their actions, it is necessary that there be some mechanism(s) to ensure that HMRC does not resile from previous commitments. In the case of individual advice (outside the context of binding rulings) or general advice, the taxpayer will have available various remedies. However, as this chapter has sought to demonstrate, there are serious shortcomings in respect of these in terms of providing protection for taxpayers.

Public law provides the most robust protection for taxpayers in the form of the doctrine of legitimate expectations. However, this is hampered by problems where the advice is incorrect, HMRC's desire to maintain control, issues around clarity, the ubiquity of qualifications in the advice and restrictions on access to justice. The extent to which the ECHR and EU law can supplement the common law doctrine of legitimate expectations is limited at best. That is not to say that the doctrine of legitimate expectations fails to find an appropriate balance between individual interests and the interests of the general public. It is, rather, that it is inapt for the purpose of providing reliability for taxpayers in respect of HMRC advice. Private law, meanwhile, is underdeveloped in this area. Finally, the assistance that the Adjudicator and Ombudsman may provide should neither be

[250] Parliamentary Commissioner for Administration, 'Fifth report for session 1983–84' (HC 1983–84, 322) 26–27.

[251] R Kirkham, 'Parliamentary Ombudsman: Withstanding the Test of Time' (HC 2006–07, 421) 5.

understated, in that evidence can be produced to demonstrate that both bodies can be effective in holding HMRC to its advice, nor overstated, in that their remit and the enforceability of their recommendations are limited.

The fact that there are such shortcomings in the protections available to taxpayers is a matter of concern not just from the perspective of the rule of law, but also operationally for HMRC. The production of advice is warranted on the basis that it facilitates collection of tax and hence HMRC performing its primary statutory duty. The judgment in *Gaines-Cooper*, however, suggests that taxpayers should not rely on general advice, but rather should approach HMRC directly whenever an issue of difficulty arises. This may require significant correspondence in order to ensure that there is absolute agreement of the scope and application of the advice provided. This in turn will have the effect of increasing the costs of collection otherwise reduced by the provision of general advice in the first place![252]

[252] Williams, 'The Multiple Doctrines of Legitimate Expectations' (n 33) 651–652.